Southwest Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America *and* Standard Drywall, Inc. and Operative Plasterers' and Cement Masons' International Association, Local No. 200, AFL–CIO. Case 21–CD–657

January 31, 2006

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act (the Act). The charges in this proceeding were filed by Standard Drywall, Inc. (the Employer) on February 2, 2005, as amended on April 1 and May 4, 2005,[1] alleging that Southwest Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of American (Carpenters) violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees represented by Carpenters rather than to employees represented by Operative Plasterers' and Cement Masons' International Association, Local No. 200, AFL–CIO (Plasterers).

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The parties stipulated that the Employer is a California corporation, with its principal place of business in Riverside County and offices located in Arizona, Wyoming, and Utah, where it is engaged as a contractor and/or subcontractor in the drywall construction industry. They also stipulated that the Employer annually purchases goods and materials valued in excess of $50,000, which goods and materials are manufactured outside the State of California and shipped directly to the Employer's California project involved in this proceeding. The parties further stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. Finally, the parties stipulated, and we find, that Carpenters and Plasterers are labor organizations within the meaning of Section 2(5) of the Act.

[1] All dates are 2005, unless otherwise specified.

II. THE DISPUTE

A. Background and Facts of the Dispute

The Employer's California drywall employees are covered by a Memorandum Agreement with Carpenters effective by its terms from January 1, 2005, to June 30, 2006.[2] This memorandum incorporates the current Southern California Drywall/Lathing Master Agreement which is effective for the same term. The Employer's and Carpenters' bargaining relationship dates back at least 10 years. The Employer has never had a bargaining relationship with Plasterers.

In March 2004, the Employer entered into a subcontracting agreement with Hensel Phelps Construction Co. (Phelps), to perform plastering work on the Fine Arts project located at the California State University campus in Fullerton, California (CSF Fine Arts Project). Phelps has a collective-bargaining agreement with the Cement Masons Local 500, which is not a party to this proceeding.[3]

In about December 2004, the Employer began work on the CSF Fine Arts Project, utilizing approximately 10 of its employees, all covered by the Carpenters' Agreement. Thereafter, in December or January 2005, Plasterers Representative Russ Nicholson came to the CSF Fine Arts Project jobsite and told the Employer's Superintendent David Corona that he would "like to have the guys come back and sign with [Plasterers] Local 200." The Employer did not do so.

In about April 2005, Plasterers Business Agent Russ Nicholson went to the CSF Fine Arts Project and spoke with Superintendent David Corona. Nicholson spoke negatively about Carpenters and allegedly told Corona that he would like the Employer to sign with Plasterers. Corona testified that Nicholson further stated that the Employer's employees were performing Local 200 work. Nicholson denied making this statement.[4]

About April 28, Carpenters sent the Employer and the general contractor Hensel-Phelps a letter, stating: "We have been informed that [Plasterers] is demanding that our members be removed from performing the plastering work and be replaced by members of [Plasterers]. [Plasterers] has filed a grievance against Hensel Phelps in

[2] This agreement is termed the Southern California Conference of Carpenters Drywall/Lathing Memorandum Agreement.

[3] Although there was some evidence introduced into the record as to a purported claim by Cement Masons Local 500 for the disputed work, and a Carpenters threat to "protect their interests" in the work, the Region determined that there was insufficient evidence that Local 500 claimed the work, and these issues are not before us.

[4] There is also contradictory testimony in the record as to whether Nicholson's request that the Employer sign with Plasterers was specific to the CSF Fine Arts Project or was more general.

furtherance of its demands." Carpenters' letter further stated that if the plastering work on the project were reassigned to the employees represented by Plasterers, "Carpenters will immediately establish a picket line at the project to protect the interests [sic] and its jurisdiction over the plastering work."

In May 2005, Plasterers representatives told the Employer that if it would sign an agreement assigning Plasterers the disputed work, they would try to secure the dismissal of a lawsuit that Plasterers Business Manager Robert Pullen and Business Agent David Fritchel, as individuals, had filed in October 2004, claiming that the Employer had violated state prevailing wage laws at public works projects in Southern California).[5] However, the Superior Court of California later ruled that these two persons lacked standing.

On August 9, an amended complaint in this same lawsuit was filed in which Plasterers was added as a plaintiff. The complaint added, inter alia, that the Employer was required to use Plasterers' apprenticeship program to obtain employees to perform plastering work "on public works projects in Southern California." The lawsuit sought injunctive relief and compensatory damages to remedy the Employer's failure to use the apprenticeship program and its alleged breach of prevailing wage law.

About August 16, while its prevailing wage suit was pending, Plasterers Business Manager Robert Pullen sent a letter to the Employer disclaiming any interest in representing employees performing work at the CSF Fine Arts Project.

About August 28, the Department of Forestry and Fire Protection issued a Certificate of Occupancy, which stated that "the facility may be occupied for the intended use." Plasterers asserts that this certificate is evidence that the project is complete and, therefore, the jurisdictional dispute is moot.

Finally, during the September 9 hearing, Gordon Hubel, contract administrator for the Carpenters, testified that the Carpenters would picket any job in the 12 Southern California counties where the Employer reassigned plastering work to employees represented by Plasterers.

B. Work in Dispute

The parties stipulated that the work in dispute is:

Plastering work at the California State University Fullerton, Fine Arts Project. Plastering work is defined as follows:

A. Corner beads when stuck on.

B. All interior or exterior plastering using gypsum, Portland Cement plaster (excepting cement bases 6 inches (6") or lower, stucco, radian heat fill material, marble-crete, imitation brick or masonry, embedding of chips and stones, the finishing of same and mortars applied by the normal methods used by plasterers.

C. The waterproofing of plaster including such materials as Thoroseal and Ironite.

D. The bonding and scratching of all ceilings and walls to receive terrazzo and tile; and bonding, scratching and browning to receive thin set tile.

E. The sticking, nailing and screwing on of all plaster caps and ornaments.

F. The application of bond coat okasters, bond dash coats and bonding agents to which plaster is to be applied regardless of tools used, method of application, color of material or type of base to which it is applied.

G. The application of materials used for contract fireproofing, fireproofing, acoustical finish, or decorative finish.

H. All moldings run in place. The making of all templates and the horsing of molds for interior and exterior work. The sticking in place of all staff work and plaster enrichments.

I. The initial cleaning of areas immediately adjacent to the plastering and concurrent with the plastering operation.

J. Plasterers shall have the autonomy governing the mixing and applying of all materials used for plaster patching.

K. The installation of Exterior Insulation Finish Systems (EIFS), starting with the foam.

L. The carving or texturing of "positive" rock and other theme work created from gypsum, Portland cement, or acrylic plaster.

C. Contentions of the Parties

Plasterers contends that the notice of the 10(k) hearing should be quashed because it never made a claim for the work at the CSF Fine Arts Project. Plasterers asserts that its prevailing wage lawsuit is not a claim for the work or relevant to this jurisdictional dispute. Plasterers contends that the lawsuit merely states that prevailing wages are to be paid to the Employer's plasterers and that any plasterer hired by the Employer should be from an approved apprenticeship program. Plasterers further contends that even though the Region mistakenly believed that it claimed the work, Plasterers addressed the Region's concerns when, in its August 16 letter to the Employer, it effectively disclaimed all interest in the work. Plasterers additionally asserts that because the work has been com-

[5] Plasterers Business Manager Robert Pullen testified, "In regards to all the violations with the state, we made reference that we could not make them go away, all we could do was talk to the state about it."

pleted on the CSF Fine Arts Project, this Section 10(k) proceeding is moot. Finally, on the merits, Plasterers takes no position as to which employees should be awarded the work in dispute.

The Employer contends that Plasterers made several demands for the work in dispute and cites in support the conversations between the Employer's superintendent, Corona, and Plasterers Business Agent Nicholson. In addition, the Employer contends that Plasterers' prevailing wage lawsuit demonstrates a continued demand for the work. Further, the Employer contends that the disclaimer of interest by Plasterers is ineffective in light of the prevailing wage lawsuit.

The Employer contends that there is no substantive evidence that the work in dispute has in fact been completed,[6] and further contends that even if the work has been completed, the Section 10(k) hearing is not moot because a possibility exists that the same issue will arise in the future.

Finally, the Employer contends that there is reasonable cause to believe that Section 8(b)(4)(D) was violated, based on Carpenters' oral and written threats of picketing made to Phelps and the Employer, which threat Carpenters repeated at the hearing.

On the merits, the Employer argues that the disputed work should be awarded to the employees represented by Carpenters based on the factors of certifications and collective-bargaining agreements, employer preference and past practice, area and industry practice, relative skills, and economy and efficiency of operations.

Carpenters does not take a position on Plasterers' motion to quash, and generally asserts that the work should be assigned to the employees it represents.

D. Applicability of the Statute

Before the Board may proceed with determining a dispute pursuant to Section 10(k) of the Act, there must be reasonable cause to believe that Section 8(b)(4)(D) has been violated. This standard requires that there is reasonable cause to believe that there are competing claims for the disputed work among rival groups of employees and that a party has used proscribed means to enforce its claim to the work in dispute. E.g., *Electrical Workers Local 3 (Slattery Skanska)*, 342 NLRB No. 21, slip. op at 3 (2004). Additionally, the Board will not proceed under Section 10(k) unless the parties have no agreed-upon method for the voluntary adjustment of the dispute. Id. On this record, we find that this standard has been met.

1. Competing claims for work

The evidence establishes that Carpenters claims the disputed work. Such claim is shown by the fact that employees it represents perform the work. *Longshoremen Local 14 (Sierra Pacific Industries)*, 314 NLRB 834, 836 (1994). In addition, Carpenters' April 28 threat to Phelps and the Employer that it would picket if the disputed work were reassigned constitutes a clear claim to the work.

As noted above, Plasterers argues that it never claimed the work and, for this reason, the notice of Section 10(k) hearing should be quashed. In support of its argument, Plasterers asserts that the testimony of its representative, Nicholson, should be credited that he never requested the Employer's project work or claimed that Carpenters were performing Plasterers work. Plasterers further asserts that its prevailing wage lawsuit, originally filed in October 2004 prior to the Employer's beginning work on the CSF Fine Arts Project, does not constitute a claim for work and is irrelevant to the issue of a jurisdictional dispute. Plasterers contends that the lawsuit merely states that prevailing wages are to be paid to the Employer's plasterers and that any plasterer hired by the Employer should be from an approved apprenticeship program. We reject these arguments for the following reasons.

First, we find that there is reasonable cause to believe that Plasterers did claim the work in dispute. There is testimony that on two occasions, first in December 2004 or January 2005 and again in April 2005, Plasterers' representative Nicholson told superintendent Corona that he would like the Employer "to come back and sign with Local 200 (Plasterers)."[7] Further, in May 2005, Plasterers Business Manager Pullen admitted that he offered to try to secure the dismissal of the lawsuit in return for obtaining the work in dispute from the Employer.

Next, we find Plasterers' purported disclaimer of interest in the disputed work is ineffective. The disclaimer was not made until August 16, 2005, approximately 8 months after the Employer commenced work on the project, and shortly before commencement of the September 9 hearing in this matter.[8] Further, the disclaimer was

[6] The Employer's vice president, Caya, testified at the September 9, 2005 hearing that the work was not finished, that there was work being done on punch list items since at least August 18, 2005. He described the punch list as final tasks that need to be done on a project and that this would include plastering work.

[7] Although Nicholson denied making these statements, his denial does not prevent determination of the dispute because the Board need not rule on the credibility of conflicting testimony in order to proceed under Sec. 10(k). E.g., *Slattery Skanska*, supra, slip op. at 3.

[8] Chairman Battista and Member Schaumber additionally rely on the continuation of the lawsuit as a basis for finding the Plasterers' disclaimer ineffective. *See Iron Workers Local 118 (Clark & Sullivan)* 305 NLRB 395 (1991) (no effective disclaimer of union interest in disputed work where union's prevailing wage lawsuit alleged that work

made after the majority of the project work was completed.[9] "Although it is well settled that an effective renunciation of work in dispute resolves a jurisdictional dispute, the Board will refuse to give effect to 'hollow disclaimers' interposed for the purpose of avoiding an authoritative decision on the merits." *Laborers Local 81 (Kenny Construction Co.)*, 338 NLRB 977, 978 (2003), quoting *Mine Workers (Conn-Serv, Inc.)*, 299 NLRB 865, 868 (1990), (disclaimer of future work offered at the start of the hearing when 90 percent of disputed work was complete found ineffective).

In addition, although the parties dispute whether the work has in fact been completed, resolution of this issue is not necessary. "[T]he mere fact that disputed work has been completed does not render a jurisdictional dispute moot where nothing indicates that similar disputes are unlikely to recur." See *Millwright Local 1906 (Chicago Steel)*, 310 NLRB 646, 648 fn. 8 (1993), citing *Operating Engineers Local 150 (Martin Cement)*, 284 NLRB 858, 860 fn. 4 (1987). See also *Iron Workers California District Council (Madison Industries*), 307 NLRB 405 (1992).

We therefore find that there is reasonable cause to believe that there are competing claims for the work.

2. Use of proscribed means

As discussed above, Carpenters threatened Phelps and the Employer on April 28 that it would picket the CSF Fine Arts Project if the disputed work was reassigned. Carpenters repeated this threat at the September hearing, stating that it would picket any job in the 12 Southern California counties where the Employer reassigned plastering work to employees represented by Plasterers.

On this basis, we find that there is reasonable cause to believe that Carpenters used proscribed means to enforce its claim to the work in dispute.

3. No voluntary method for adjustment of dispute

The parties stipulated at the hearing, and there is no evidence to the contrary, that there is no agreed on method for voluntary adjustment of the work in dispute.

Based on the forgoing, we find that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, and that there is no agreed on method for voluntary adjustment of the work in dispute. We therefore find that the dispute is properly before the Board for determination and deny Plasterers' motion to quash.[10]

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J.A. Jones Construction)*, 135 NLRB 1402, 1410–1411 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certifications and collective-bargaining agreements

The parties stipulated that there are no Board orders or certifications determining the collective-bargaining representative of the employees performing the work in dispute.

The evidence shows that the Employer has a collective-bargaining agreement with Carpenters for the term of 2002 to 2006, which includes a master agreement, a memorandum agreement, an amendment to the memorandum agreement, and a second amendment to the memorandum agreement. The agreement includes the 12 Southern California counties, with the master agreement and the amendment covering plastering work. A second amendment, signed on June 29, 2002, states that Carpenters has provided evidence to the Employer that a majority of the employees covered by the agreement has designated Carpenters as their collective-bargaining representative, and that based on this evidence the Employer has extended recognition to Carpenters as the Section 9(a) representative of the employees covered by the agreement.

was within the union's jurisdiction and sought compensatory damages for the loss of work). The lawsuit claimed that the Employer was legally obligated to use apprentices to perform the disputed work who were trained by an apprenticeship program approved by the state to provide training in the plastering craft and that the Plasterers' program was the only program so approved. In remedy the lawsuit sought an injunction requiring the Employer to use apprentices from the Plasterers apprenticeship program and compensatory damages for those apprentices' loss of work. It follows that the lawsuit had a jurisdictional objective because in effect it both claimed Plasterers' jurisdiction over the disputed work and sought relief that would force the Employer to assign the disputed work to Plasterers-represented employees. Chairman Battista and Member Schaumber additionally observe that the jurisdictional objective of the lawsuit is shown by Plasterers' offer to seek its dismissal in return for the Employer's agreement to assign its members the disputed work.

[9] Although the Employer disputes the Plasterers' claim that the project work was completed on August 18, 2 days after the purported disclaimer, it admits that, as of August 18, the remaining work was 'punch list' items which are undertaken at the end of a project.

[10] We, therefore, find it unnecessary to pass on the Employer's request to reopen the record to take evidence regarding the Cement Masons Local 500 grievance.

At the hearing, the Employer's vice president, Blaine Caya, testified that the Employer has never recognized Plasterers as the collective-bargaining representative of any of its employees and has never had a collective-bargaining agreement with it.

We find that the factor of collective-bargaining agreements favors awarding the work in dispute to employees represented by Carpenters.

2. Employer preference and past practice

Employer Vice President Caya testified that the Employer prefers to have employees represented by Carpenters do the plastering work. Caya also testified that since 2002 it has been the Employer's practice to assign plastering work in the 12 Southern California counties to employees represented by Carpenters.

We find that this factor favors awarding the work in dispute to the employees represented by Carpenters.

3. Area and industry practice

Carpenters Contract Administrator Gordon Hubel testified that in Southern California approximately 50 percent of plastering work is not unionized, and about 30 to 40 to percent of the lathe and plastering work has been assigned to employees represented by Carpenters. In addition, Caya named in his testimony several major competitors who assign plastering work to employees represented by Carpenters.

Plasterers Business Manager Robert Pullen testified that about 14 percent of the area plastering work is assigned to employees represented by Plasterers. Hubel testified that Carpenters has between 35,000 to 40,000 members in this area, and Pullen testified that Plasterers has about 1,100 to 1,200 members in the area, of whom about 100 are active (that is, working) members.

We find from the above evidence that this factor favors awarding the work in dispute to employees represented by Carpenters.

4. Relative skills

Caya testified that the Employer has employed employees represented by Carpenters for its plastering work and has been satisfied with the training those employees have received. The Employer considers Carpenters' training program to be state-of-the-art. Caya testified that Carpenters' training included "all the aspects of the construction field, not just the plastering, but drywall handing, drywall faming, blueprint reading." The Employer's Superintendent David Corona expressed a similar view of Carpenters' training program. He testified that "[t]he more these people know, the more valuable they are to us . . . [t]he guys that work for us are really well rounded and have knowledge, in other things, besides just plaster." Corona also testified that Plasterers' training program is "teaching stuff that is outdated a lot of times."

Plasterers presented a document stating that its training program meets the requirements for individuals seeking EIFS[11] certification. Plasterers presented no other evidence of the skill level of its members.

We find that the record establishes that Carpenters members are highly trained and skilled, and that the limited evidence presented by Plasterers fails to establish that its members have a comparable level of training and skills necessary to perform the work in dispute. We thus find that this factor favors awarding the work in dispute to employees represented by Carpenters.

5. Economy and efficiency of operations

The Employer presented evidence that it pays its Carpenters-represented employees the carpenter journeyman's rate, which is about $5 an hour higher than the rate paid to the employees represented by Plasterers. The Employer asserts that, despite this fact, it finds it more efficient to assign its plastering work to the employees represented by Carpenters. Caya testified that "dealing with one union has cut my overhead . . . because I only have to send one reporting form. I only have to call one union, to get people dispatched . . . So, economically it has helped me there." Caya further testified that because friction between competing labor organizations has been eliminated, productivity in the field has increased by 25 to 30 percent, "which has actually made me able to pay a higher rate and still be competitive." In addition, Caya testified that he believes that the workers' compensation program the Employer has with Carpenters saves the Employer money, and that it is his understanding that no other union is eligible to participate in this program.

Caya testified that the Employer's retention of employees has gone up tenfold since it began employing members of Carpenters because the Employer can keep these employees busy 52 weeks a year, inasmuch as these employees do work other than plastering (for instance, lathing and trim work). Caya further testified that assigning all drywall tasks to one union makes for more work continuity. Caya testified, "We are not pulling one group out and bringing another one in." Caya also testified to the Employer's ability to transfer these employees to its operations outside of California, where Carpenters also represents employees doing plastering work.

Plasterers did not present any evidence showing how the assignment of the work in dispute to employees it

[11] This refers to "Exterior Insulation and Finish System," as described in the parties' stipulation of the work in dispute.

represents would affect the economy and efficiency of the Employer's operations.

Although employees represented by Plasterers are paid $5 per hour less than the employees represented by Carpenters, this fact is not significant. "[I]t is the Board's practice not to rely on the differing rate of pay of employees in determining a jurisdictional dispute." *Painters Local 91 (Frank M. Burson, Inc.)* 265 NLRB 1685, 1686 (1982); *Carpenters District Council of Milwaukee County* (*Pabst Brewing Co.)*, 255 NLRB 413, 416 fn. 9 (1981). On the other hand, the above record evidence shows that it is both economical and efficient to assign the work in dispute to employees represented by the Carpenters, and we make this finding accordingly.

Conclusions

After considering all the relevant factors, we conclude that employees represented by Carpenters are entitled to perform the work in dispute. We reach this conclusion relying on all the relevant factors—collective-bargaining agreements, employer preference and past practice, area and industry practice, relative skill, and economy and efficiency of operations. In making this determination, we are awarding the disputed work to employees represented by Carpenters, not to that labor organization or its members.

F. Scope of the Award

The Employer requests a broad award covering all its future work in the 12 Southern California counties.

The Board customarily declines to grant a broad, area-wide award in cases where the charged party represents the employees to whom the work is awarded and to whom the employer contemplates continuing to assign the work. See *Pipefitters Local 562 (Systemaire, Inc.)*, 321 NLRB 428, 431 (1996); *Laborers Local 243 (A. Amorello & Sons*), 314 NLRB 501, 503 (1994). Here, Carpenters is the charged party, and the Employer contemplates continuing to assign them the work. Accordingly, the conduct of Carpenters does not warrant a broad award.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute:

Employees of Standard Drywall, Inc. represented by Metropolitan Regional Counsel of Carpenters are entitled to perform the work in dispute:

Plastering work at the California State University Fullerton, Fine Arts Project. Plastering work is defined as follows:

A. Corner beads when stuck on.

B. All interior or exterior plastering using gypsum, Portland Cement plaster (excepting cement bases 6 inches (6") or lower, stucco, radian heat fill material, marble-crete, imitation brick or masonry, embedding of chips and stones, the finishing of same and mortars applied by the normal methods used by plasterers.

C. The waterproofing of plaster including such materials as Thoroseal and Ironite.

D. The bonding and scratching of all ceilings and walls to receive terrazzo and tile; and bonding, scratching and browning to receive thin set tile.

E. The sticking, nailing and screwing on of all plaster caps and ornaments.

F. The application of bond coat okasters, bond dash coats and bonding agents to which plaster is to be applied regardless of tools used, method of application, color of material or type of base to which it is applied.

G. The application of materials used for contract fireproofing, fireproofing, acoustical finish, or decorative finish.

H. All moldings run in place. The making of all templates and the horsing of molds for interior and exterior work. The sticking in place of all staff work and plaster enrichments.

I. The initial cleaning of areas immediately adjacent to the plastering and concurrent with the plastering operation.

J. Plasterers shall have the autonomy governing the mixing and applying of all materials used for plaster patching.

K. The installation of Exterior Insulation Finish Systems (EIFS), starting with the foam.

L. The carving or texturing of "positive" rock and other theme work created from gypsum, Portland cement, or acrylic plaster.

Dated, Washington, D.C. January 31, 2006

Robert J. Battista	Chairman
Wilma B. Liebman,	Member
Peter C. Schaumber	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD